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613266—44——1

# In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 575

COLORADO-WYOMING GAS COMPANY, A CORPORATION, PETITIONER

*v.*

FEDERAL POWER COMMISSION; COLORADO INTERSTATE GAS COMPANY, A CORPORATION; CITY AND COUNTY OF DENVER, COLORADO; PUBLIC SERVICE COMMISSION OF WYOMING; PUBLIC SERVICE COMPANY OF COLORADO; AND CANADIAN RIVER GAS COMPANY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE FEDERAL POWER COMMISSION AND PUBLIC SERVICE COMMISSION OF WYOMING, IN OPPOSITION

### OPINIONS BELOW

The opinion and orders of the Federal Power Commission (R. I, 45–97) are reported in 43 P. U. R. (N. S.) 205. The opinion of the circuit court of appeals (R. II, 1092–1120) is reported in 142 F. (2d) 943.

## JURISDICTION

The judgment of the circuit court of appeals was entered on July 8, 1944 (R. II, 1120). A petition for rehearing (R. II, 1123–1160) was denied on August 9, 1944 (R. II, 1161). The petition for a writ of certiorari was filed on October 10, 1944. Jurisdiction of this Court is invoked under Section 19 (b) of the Natural Gas Act, and Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether natural gas, produced in Texas and transported without interruption into Colorado where it is bought by petitioner, is sold "in interstate commerce" within the meaning of the Natural Gas Act when petitioner sells that gas within the state for resale.

2. Whether the Commission's allocation of costs between petitioner's direct sales and the cost of its sales for resale is appropriate.

3. Whether the reduction in petitioner's rates ordered by the Commission will result in "just and reasonable" rates.

## STATUTES INVOLVED

The applicable portions of the Natural Gas Act are set forth in the Appendix, *infra*, pp. 14–18.

## STATEMENT

The order here under review, reducing the interstate wholesale rates of petitioner, Colorado-

Wyoming Gas Company, was entered in a consolidated proceeding which also involved the interstate wholesale rates of Colorado Interstate Gas Company ("Colorado Company"), from which petitioner purchases approximately 98% of its gas requirements (R. I, 94),[1] and the interstate wholesale rates of Canadian River Gas Company ("Canadian Company"), from which Colorado Company, in turn, obtains such gas. The gas purchased by petitioner from the Colorado Company originates in the Panhandle field in Texas and flows, through the interconnected pipe line of the Canadian Company and Colorado Company, from Texas, through New Mexico, to a point near Littleton, Colorado. There the gas flows without interruption into the main pipe line of petitioner which runs approximately 114 miles to Cheyenne, Wyoming where petitioner sells for resale to the Cheyenne Light, Fuel and Power Company. Petitioner's facilities also include compressor stations and a number of laterals through which sales are made in Colorado for resale. Sales are also made directly to industrial consumers in Colorado and, in small quantities, to two United States army posts. (R. I, 47–50, 94.)

[1] Petitioner obtains some 2% of its gas from a local source in Colorado, but this is, in substance, an exchange arrangement as to which the Commission assumed that costs equal revenues (R. I, 83).

On January 9, 1939, the Public Service Commission of Wyoming filed a complaint against Colorado Company, Canadian Company, and petitioner, alleging that the rates charged by petitioner for gas sold to its affiliate, Cheyenne Light, Fuel and Power Company, for resale in Cheyenne, Wyoming, were unjust, unreasonable, and unduly discriminatory (R. I, 29–31). A similar complaint against Colorado Company and Canadian Company had been filed by the City and County of Denver, Colorado, on December 22, 1938, in respect of the rates charged by Colorado Company for gas sold to Public Service Company of Colorado for resale in Denver (R. I, 42). The Federal Power Commission, on March 14, 1939, instituted an investigation, on its own motion, of all the interstate wholesale rates of Colorado Company, Canadian Company, and petitioner (R. I, 38–41).

The investigation and hearings on the complaints were consolidated by the Commission; hearings were begun on October 28, 1940 and held on 102 days (R. I, 46). After submission of briefs, the Commission, on March 18, 1942, issued its opinion and orders finding that the interstate wholesale rates of Canadian Company, Colorado Company, and petitioner were excessive (R. I. 45–97). The first order required Canadian Company to reduce its rates by $561,000 per year

(R. I, 87–90). The second order required Colorado Company to reduce its interstate wholesale rates by $2,065,000 per year, which amount was represented in part by the ordered reduction in Canadian Company's rates to Colorado Company (R. I, 90–94).[2] In promulgating the third order, the one here under review, the Commission found that petitioner's revenues were $159,000 in excess of costs and a fair return, and that $119,000 of such excess was allocable to petitioner's sales for resale. Petitioner was accordingly directed to reduce its wholesale rates by $119,000 (R. I, 94–97). Since the Commission had ordered Colorado Company to reduce its rates to petitioner by $98,000 per year, the net decrease in the revenues of petitioner will not exceed $21,000 (R. I, 83).

In requiring petitioner to reduce its interstate wholesale rates by $119,000 annually, the Commission found the actual legitimate cost of petitioner's plant on December 31, 1939, to be $1,678,878 (R. I, 95). From this amount the Commission deducted $395,944 for accrued depreciation and $12,183 for contributions in aid of construction; it added $16,235 for working capital and $78,813 covering gross plant additions to December 31, 1941. This resulted in a rate base

[2] Petitions for writs of certiorari to review the lower court's affirmance of these orders are now pending. (Nos. 379 and 380, this Term.)

of $1,365,799 which was rounded to $1,366,000. (R. I, 95). Petitioner's claim of $175,000 for "going value" was found to be an estimate unrelated to any costs or outlays and was rejected by the Commission (R. I, 68).

The Commission allowed a 6½% return on petitioner's rate base, which return it found to be "fair and reasonable" (R. I, 93). It adjusted petitioner's cost of purchased gas to reflect the $98,000 annual reduction in Colorado Company's rates to petitioner, and with certain minor exceptions, allowed all necessary operating expenses, including taxes, shown by petitioner's books for the test year 1939 (R. I, 95). The Commission also allowed an amount to amortize rate case expenses over a five-year period (R. I, 95). The annual allowance for depreciation was determined on the basis of the economic service lives of petitioner's property, such allowance being consistent with the amount deducted for accrued depreciation in arriving at the rate base (R. I, 61).

In arriving at the amount of the reduction in petitioner's interstate wholesale rates, the Commission made an allocation of petitioner's cost of service including in such cost the fair return on the rate base, and determined the excess of revenues over costs for direct sales and for interstate sales for resale (R. I, 83, 85, 96).

The petitioner's application for a rehearing and stay of the Commission's order (R. I, 97) was denied by supplemental opinion and order of May 13, 1942 (R. I, 98–103). Petitioner thereafter filed a petition for review (R. I, 1–19) in the Circuit Court of Appeals for the Tenth Circuit, which heard argument on September 14–15, 1943 (R. II, 1091), handed down its opinion on May 16, 1944 (R. II, 1091–1120), and entered its judgment on July 8, 1944 (R. II, 1120), affirming the Commission's order.

**ARGUMENT**

Petitioner sets forth thirteen questions (Pet. 2–7) and seeks to develop the materiality of such questions and the necessity for their consideration by this Court in a fifty-four page brief (Br. 17–71). Many of the questions involve alleged errors in recent decisions of this Court which we deem unnecessary to discuss.

1. Petitioner admits that its sales of natural gas at the "city gate" of Cheyenne, Wyoming, for resale in that city, are subject to the Commission's jurisdiction under the Act, but contends that its sales at various "city gates" in the State of Colorado are not "in interstate commerce" and are therefore beyond the Commission's jurisdiction (Br. 18–24). But under the decision of this Court in *Illinois Natural Gas Company* v. *Central*

*Illinois Public Service Company*, 314 U. S. 498, 508, it is clear that in transporting Texas gas from Littleton, Colorado, and selling it at various "city gates" in Colorado for resale, petitioner "engages in interstate commerce in gas and in its interstate transportation" within the meaning of the Natural Gas Act. In the *Illinois* case, the company's facilities were located wholly within the State of Illinois and it there purchased gas which had been brought into the state from Texas and Oklahoma. The Company transported such gas to various "city gates" in Illinois, where it was sold to distributing companies for resale. Here, as in that case, petitioner "makes the first sale to distributors for resale to which the Act in terms applies."

2. Petitioner objects to the Commission's allocation of costs between its direct sales and its sales for resale and contends that the Commission was required to make an allocation of property (Pet. 4–5). We submit that this contention is without merit.[3] The Natural Gas Act does not prescribe any method of allocation, nor even require that any formal allocation be made. The Commission found that "all that can be accomplished by an allocation of physical properties can be attained by allocating costs including the re-

[3] An identical contention is discussed in the Brief in Opposition, pp. 17–18, in Nos. 379 and 380, this Term.

turn" (R. I, 80). This method, which the Commission termed "by far the most practical and business-like", was described in its opinion as follows (R. I, 80–82): "* * * * costs are divided essentially into two groups, fixed and variable. Fixed costs are largely joint costs which do not vary with volume of sales. The total amount of such costs are largely proportional to the maximum demand on the system or system capacity. Accordingly, these costs have been allocated basically in proportion to each customer's responsibility for the peak day demand. Variable costs are largely those that vary proportional to output or volume of sale. Accordingly, these costs have been allocated in proportion to volume of gas purchased by each customer." Contrary to petitioner's contentions (Pet. 4), the Commission's use of the peak day of the system as the basis of allocating the capacity costs was appropriate in the circumstances (R. I, 79; R. II, 761). Moreover, the Commission used "the coincident demands" of all customers on that day (R. I, 82) and thus recognized the service priority of the domestic consumers. As the record shows, this resulted in an increased allocation of costs to the interstate sales which are subject to the Act, and a proportionately lower rate reduction for such sales (R. II, 735). Accordingly, the allocation made by the Commission was, as the lower court

observed, "a working one suitably adapted to the particular circumstances" (R. II, 1113).

3. The petitioner does not discuss the "impact" or "end result" of the Commission's order, and by its argument (Br. 22–44) impliedly concedes that the rate reduction prescribed by the Commission meets this standard. In any event, the financial history of petitioner would not sustain an argument that the Commission's rate order is not "just and reasonable."

Petitioner was organized, financed, and controlled by the Henry L. Doherty—Cities Service interests (R. III, Test. Smith, 4–10). Petitioner has no bonds, mortgage debt or preferred stock, and its 50,000 shares no par common stock are stated on its books at $1,501,000 (R. III. Test. Smith, 7). This amount represents the $1,000 paid in cash for 10 shares of such stock in 1925 and the recorded value ($1,500,000) of a stock dividend of 45,000 shares issued to a subsidiary of Cities Service, Public Service Company of Colorado, in 1931 (R. III, Test. Smith, 7–8). The book value assigned to the stock dividend was made up of $1,139,075.67 of construction funds which Cities Service had advanced to petitioner and $360,924.33 derived from petitioner's operating profits (R. III, Test. Smith, ). In addition to the stock dividend, petitioner paid cash dividends which, by the end of the test year, 1939,

totalled $1,445,000 (R. III, Ex. 202, p. 8). It also accumulated by that date a depreciation reserve of $486,405.67 and an undistributed surplus of $23,076.48 (R. III, Ex. 204, p. 2).

As a result of the Commission's order in the consolidated proceedings reducing the rates of Colorado Interstate Gas Company, there will be an annual reduction of $98,000 in the cost of purchased gas to petitioner. The $119,000 reduction in petitioner's rates, ordered by the Commission and here under review, will accordingly reduce petitioner's net revenues to the extent of only $21,000.[1] The Commission's order permits petitioner to earn not less than $132,553 per year from its utility operations. In addition, petitioner has loaned $98,000 to its parent, Public Service Company of Colorado, from which it receives interest of $5,900 per year. The income available for dividends on petitioner's common stock, therefore, will amount to at least $138,453 after giving effect to the rate reduction ordered by the Commission. This is the equivalent of a return of 9.08% on petitioner's combined capital stock and surplus at the end of the test year. In these circumstances, there can be no complaint that the Commission's rate order is not "just and reasonable". See

[1] The net reduction of $21,000 is further decreased by the income tax saving, which at the 1939 rate of 16½% would be $3,465.00 and at the 1942 rate of 40% would be $8,400.

*Federal Power Commission* v. *Natural Gas Pipeline Company*, 315 U. S. 575, 578–579, and *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 603–606.

In this connection, certain other contentions which petitioner advances may be dealt with briefly. The $83,000 of inter-company "engineering" fees (Br. 47) was questioned by the staff in accordance with the Commisson's established rule of "no profits to affiliates" and, as the record shows, the Commission made an ample allowance for engineering services and expenses (R. III, Ex. 199, p. 84). Petitioner's objections to the Commission's refusal to make a separate allowance for "going concern value" are also without merit. *Federal Power Commission* v. *Natural Gas Pipeline Company*, 315 U. S. 575, 589. Finally, contrary to petitioner's contentions (Pet. 3–4), the Commission's findings with respect to accrued depreciation were fully supported by substantial evidence (R. I, 462–531; R. II, 556–562).[5]

[5] In respect of the "due process" contentions advanced by the petitioner (Pet. 4, 6, 7, Br. 65–71), that the Commission and the court below "scrambled" this case with those of the Canadian and Colorado companies, it is sufficient to observe that petitioner was given a full hearing before the Commission which, in its opinion, dealt separately with the issues raised by petitioner (R. I, 52, 59, 68, 74–75, 82–84) and entered an individual order with respect to petitioner's rates (R. I, 94–97). Moreover, the court below heard this case upon a separate record and briefs, and entered a separate decree.

## CONCLUSION

The decision below is correct and there is no conflict. We respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1944.

## APPENDIX

The pertinent provisions of the Natural Gas Act of 1938, c. 556, 52 Stat. 821 (15 U. S. C. 717 *et seq.*), are as follows:

SEC. 1. (b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix

the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

SEC. 6. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of

transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

SEC. 9. (a) The Commission may, after hearing, require natural-gas companies to carry proper and adequate depreciation and amortization accounts in accordance with such rules, regulations, and forms of account as the Commission may prescribe. The Commission may from time to time ascertain and determine, and by order fix, the proper and adequate rates of depreciation and amortization of the several classes of property of each natural-gas company used or useful in the production, transportation, or sale of natural gas. Each natural-gas company shall conform its depreciation and amortization accounts to the rates so ascertained, determined, and fixed. No natural-gas company subject to the jurisdiction of the Commission shall charge to operating expenses any depreciation or amortization charges on classes of property other than those prescribed by the Commission, or charge with

respect to any class of property a percentage of depreciation or amortization other than that prescribed therefor by the Commission. No such natural-gas company shall in any case include in any form under its operating or other expenses any depreciation, amortization, or other charge or expenditure included elsewhere as a depreciation or amortization charge or otherwise under its operating or other expenses. Nothing in this section shall limit the power of a State commission to determine in the exercise of its jurisdiction, with respect to any natural-gas company, the percentage rates of depreciation or amortization to be allowed, as to any class of property of such natural-gas company, or the composite depreciation or amortization rate, for the purpose of determining rates or charges.

SEC. 19. (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable

ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. * * *. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

U. S. GOVERNMENT PRINTING OFFICE: 1944